IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2390 of 1993
WITH
CIVIL APPLICATION NO.3969 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA Sd/
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHER BABU BHAGWAN

Versus

AHER RAM @ SIDDI BHAGAWAN - SINCE DECEASED BY HIS HEIRS

Appearance:
MR SM SHAH and MR AJ SHASTRI for the Appellants
MR JAGDISH D. JOSHI, Party-in-person for Respondents.
(Power of Attorney holder of Respondents).

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE D.A.MEHTA

Date of decision: 20/01/2001

CAV JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1. This is an appeal filed by the original defendants being aggrieved from the Judgement and order dated 12th Sept., 1990 passed by Civil Judge (S.D.), Veraval in Special Civil Suit No.41 of 1989. The respondents in the present appeal are the legal heirs of Aher Ram @ Siddi Bhagwan who was the original plaintiff.

2. Originally the suit filed by the plaintiff seeking a decree of partition was registered as Special Civil Suit No.80 of 1979 in the Court of Civil Judge (S.D.), Junagadh. Thereafter on establishment of new Civil Court (S.D.) at Veraval, the suit was transferred from Junagadh Court to the Veraval Court on 8.6.1989 and accordingly was re-numbered as Special Civil Suit No.41 of 1989 and accordingly decided by the Civil Judge (S.D.), Veraval.

3. The plaintiff's case in brief was that deceased Bhagwan Raja who was his father had two wives : that plaintiff was the son of Bhagwan Raja through the first wife while defendant No.3 was the second wife of Bhagwan Raja and defendant Nos. 1 and 2 are the sons of Bhagwan Raja by the second wife and thus defendant nos. 1 and 2 are the stepbrothers of the plaintiff while defendant No.3 is stepmother. The say of the plaintiff was that the family of Bhagwan Raja was a joint Hindu family and the properties standing in the name of Bhagwan Raja as also defendant Nos. 1 and 2 were joint Hindu family properties. The properties in question are :

SURVEY NO.	ACRE GUNTHAS	AKAR Rs. Ps.
88	1-12 7-81	
39.2	1-30	6-25
103.3	2-29	6-75
107	10-15	25-81
109.2	2-28	2-37
70 paikee	41-00	5-00
108 paikee	4-30	8-59
156 paikee	5-13	13-06
179	5-09	13-50

39.1	2-19	9-44
150-3	0-06	0-37
109.1	3-20	3-19
70 paikee	1-29	7-19
108 paikee	4-31	8-60
156 paikee	5-13	13-06
111	6-09	16-94
186	3-06	3-19
110	5-19	14-00
103.1	1-20	3-52
	51-05	

4. Out of the above properties, property bearing Survey No.110 admeasuring 5 acres 19 gunthas undoubtedly belongs to plaintiff and this has been admitted by the appellants before us also. Therefore, the dispute now revolves round the remaining properties only. The plaintiff claimed partition and share in these properties.

5. The plaintiff has also claimed partition and share in the following properties which stood in the name of late Ramsi Raja, his uncle i.e. father's brother :

SURVEY NO.	ACRE GUNTHAS
88	1-12
39.3	1-30
103.3	2-29
107	10-15
109.2	2-09
	10-34

6. All the aforesaid properties are agricultural lands. Over and above the aforesaid lands, Ramsi Raja had left 2 khordas. There were other 3 khordas situated in village Amarapur which were in the possession of Bhagwan Raja and the plaintiff has claimed his share in these properties also.

7. The mother of the plaintiff expired when he was of 12-13 years age and because of this fact he was residing at Lodhawa village at the house of his maternal grandfather. That after a few years, he returned to

Amarapur village where his father was residing and it is the say of the plaintiff that he was carrying out agricultural operations on all the aforesaid lands with his father. At that time his father Bhagwan Raja had given him approximately 15 bighas of land for cultivation and the plaintiff was assured that he would get more land at the time of partition. That thereafter the plaintiff had demanded partition from time to time and in absence of any response a notice dtd.2 Feb., 1977 was served upon his father, the original defendant, whereby the plaintiff claimed partition in the joint Hindu family. That as the said notice was not replied by the respondents, the suit was filed claiming 1/4th share on 1.5.1979.

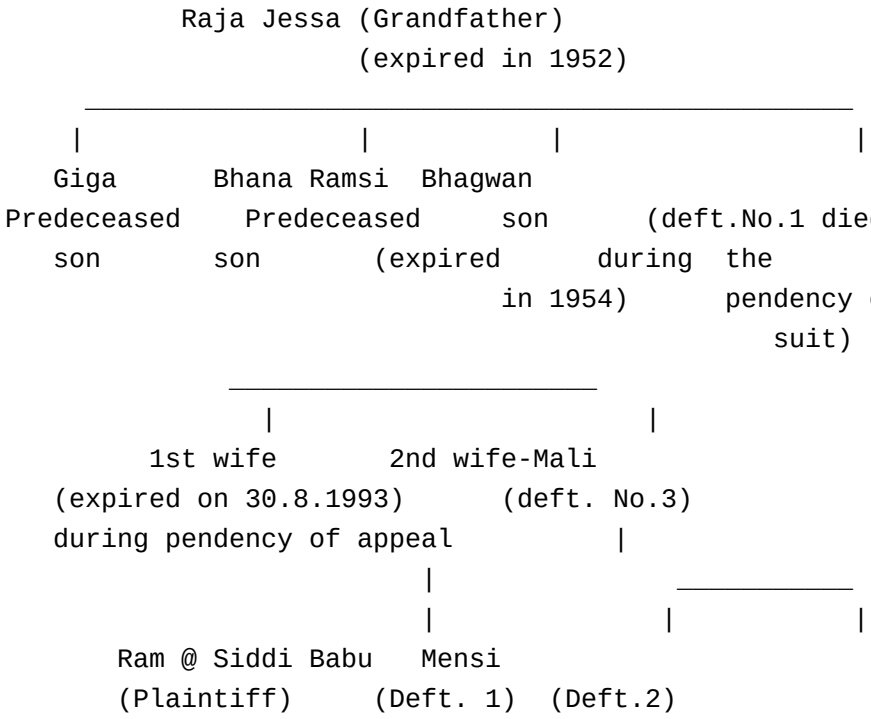
8. The defendants in their statements have stated that the suit of the plaintiff is not tenable in view of the fact that the plaintiff had grown up at his maternal grandfather's house at Lodhawa village and that he had been residing there till the date of the filing of the suit. It is further stated by the defendants that the family of Bhagwan Raja consisting of self, wife-Mali and sons Babu Bhagwan and Mensi Bhagwan was a joint Hindu family but the plaintiff was not a party of such family and was thus not entitled to get any share from the property of the joint Hindu family. The case of the defendants was further that the properties claimed to be joint are in fact self acquired properties and that plaintiff had never come to Amarapur village and cultivated lands of deceased Bhagwan Raja; that the claim of having been allotted 15 Bighas of land was got up one; that as per the revenue records some of the properties were given by Bhagwan Raja to Babu and Mensi and in light of relevant entries in revenue records the plaintiff could not claim any share nor could he claim any partition. The defendants further state that the plaintiff was not entitled to any share from the properties of Ramsi Raja: because-that the defendants were tenants-at-Will of the properties in question; that they had occupancy rights in the properties; in view of the properties being self acquired and that in case of properties which had already been transferred in names of defendant nos. 1 and 2 namely Babu and Mensi a claim for adverse possession was also set up.

9. The trial court framed the following issues and answered respectively as under :

1) Whether the plaintiff proves that the suit properties are the joint Hindu Family Properties.	: AFFIRMATIVE

2) What is the share of each party in the suit property?	1/4	
3) Whether the defendant no.1 proves that suit property is self acquired property ?	NEGATIVE	
4) To what relief, if any, the plaintiff, is entitled.	: Plaintiff is entitled to get a decree of partition and mesne profit.	
5) What order and decree :	As per final Order.	

10. The trial Court has taken into consideration the family tree which is as under :



11. In view of the fact that Giga and Bhana, who are the uncles of the plaintiff, predeceased Raja Jessa the properties of Raja Jessa (grandfather) were divided amongst Ramsi Raja and Bhagwan Raja, i.e. uncle and father of the plaintiff, respectively. Ramsi Raja expired in 1954 without leaving any heirs and as such his properties were also claimed by the family of Bhagwan Raja and were held by defendant No. 1, Babu Bhagwan. The trial Court has found that these facts are not only not disputed but are admitted. We have verified these aspects of the matter and found that this is correct factual position as can be seen from the deposition of Mensi Bhagwan (exh.37) and deposition of Babu Bhagwan

(exh.38).

12. It is in the context of this factual position that the trial Court has held that the heirs of Raja Jessa were Ramsi and Bhagwan only and on their demise the heirs were the plaintiff along with defendant nos. 1, 2 and 3. Though the defendants have disputed the claim of the plaintiff it is a contention which cannot be accepted in view of the pedigree as can be seen from the family tree and admission by defendant nos. 1 and 2 regarding the properties originally belonging to Raja Jessa, the grandfather.

13. The plaintiff having averred existence of joint family and the defendants having taken a stand that the plaintiff had already separated from the joint family and the joint family consisted only of Bhagwan Raja, Bai Mali and two sons Babu and Mensi, it was for the defendants to prove the factum of severance of status. As laid down by the appex Court in Indranarayan Vs. Roop Narayan A.I.R. 1971 SC 1962 :

"The law presumes that the members of Hindu family are joint. That presumption will be stronger in the case of father and his sons. It is for the party who pleads that a member of a family has separated himself from the family to prove it satisfactorily."

14. The defendants have admitted joint family status in relation to Bhagwan Raja, second wife and two sons, but claimed that the plaintiff, who is the son of Raja Bhagwan from the first wife does not belong to such a joint family merely on the strength of the fact that he had been residing separately at the house of his maternal grandfather. Mere residence away from the other family members, does not ipso facto lead to severance of status from the joint family and there should be something more to establish relinquishment of share from the joint family as well as separation from the status of the joint family. In the present case nothing has been shown either before the trial Court or even before us to show that the plaintiff had separated from his family and in absence of any positive, cogent, relevant material brought on record by the defendants mere physical separation cannot be a ground for holding that there was an intention to separate from the joint family. In so far as the nature of the properties is concerned, the defendants have not been able to substantiate their claim that the properties were self acquired properties of Raja

Bhagwan and that the plaintiff had no right, title or interest in those properties as they were not ancestral properties. The trial Court has found as a matter of fact that there is no documentary evidence to show that the said properties were self acquired properties. Merely because some of the properties stood in individual names of Raja Bhagwan and later on out of such properties some of them stood in the name of Babu Bhagwan and Mensi Bhagwan it cannot be held that such properties were self acquired properties. In fact, in relation to properties which stood in the name of Babu Bhagwan and Mensi Bhagwan, it was not even the case of the defendants that they were their self acquired properties: but they were properties allotted to them by their late father, Bhagwan Raja. Therefore, the factum of some properties standing in name of one and other coparcener would not make the properties self acquired when they are admittedly received on partition of ancestral properties for which there is no dispute.

15. One of the pleas put up by defendant nos. 1 and 2 before the trial Court was in relation to adverse possession on the basis of some of the properties standing in revenue records in their respective names since 1964. In relation to this claim the trial Court has found that the plaintiff had asked for partition vide notice dtd.2.2.1977 (exh.20). The defendants claim that they had not received the said notice but this contention has been found to be false by the trial Court in light of exh. 21, 22 and 23 which show acknowledgment of the registered notice by the three defendants along with their respective signatures. On the basis of this evidence the trial Court has found that the cause of action to file the suit had arisen after 2.2.1977 and the suit having been filed in 1979, it was found to be within period of limitation and the claim of adverse possession was not available to the defendants. The trial Court has further found that though the properties for which adverse possession is claimed, the defendants have not been able to show that there was mutation in revenue records after statuary notice u/s 135(b) of the Bombay Land Revenue Code, and as such, as the plaintiff was not heard by the revenue authorities the said entries could not be said to have established the rights of the defendants, the same having been made behind the back of the plaintiff. The trial Court has also stated that this would have taken place because at the time of seeking mutation in the revenue records, the revenue authority might not be aware that Bhagwan Raja had a son through first wife and this fact might not have been made known to the revenue authority either by Bhagwan Raja or any of

the defendants namely Babu or Mensi. It is in this backdrop of the facts and circumstances of the case that the trial Court has rightly held that on the basis of such entries a plea of adverse possession cannot be upheld and the right of plaintiff cannot be denied. A plea of the suit being barred by limitation was also raised by the defendants before the trial Court as well as before us. This contention was based on deposition of the plaintiff wherein he had stated that some land was allotted by father Bhagwan Raja about 8 to 9 years back and that thereafter due to harassment from his stepmother and stepbrothers he was forced to leave those lands and return to the house of his maternal grandfather. According to the defendants if the land had been allotted 8 to 9 years prior and taken back then the suit filed in 1979 was barred by time. In this connection it is to be noted that the plaintiff's deposition was recorded on 27th August, 1987 and if a period of 8 years is calculated backwards the allotment of land ought to have taken place in 1979. If that is so, there would be no occasion of serving notice of partition in Feb., 1977. Even otherwise, the plaintiff was an illiterate person as found by the trial Court, and hence the period of 8 to 9 years which is stated by him cannot be prior to 1979. In view of notice issued in 1977 the suit which is filed in 1979 would be within period of limitation as the trial Court has held and we concur with the said findings and the reason adopted by it.

16. In relation to the properties of deceased Ramsi Raja, a plea was raised that he had given those properties to defendant nos. 1 and 2 and as such at least those properties could not form part of the joint family nucleus, and hence the plaintiff was not entitled to any share from those properties. The trial Court has found that Ramsi Raja died intestate without leaving any heirs and therefore, the properties which Ramsi Raja had received from his father, namely, Raja Jessa reverted back to the surviving coparcener, namely, Bhagwan Raja as the other brothers had already expired by that time. The defendants then set up a claim on the basis of occupancy rights, that is to say Babu and Mensi being in occupation of properties of Ramsi Raja, the plaintiff was not entitled to any share from that properties. The trial Court has held that once the properties are ancestral in nature there is no question of any occupancy right available to one or the other members of the joint family vis-a-vis other members of the family and there can't be any independent right and in our view rightly so. Till the existence of the joint family no member has any right in any specific property to the exclusion of the others

and all the members have equal undivided right over the property.

17. At the time of hearing before us a contention was raised that even if the properties in question were ancestral in nature, when Bhagwan Raja and Ramsi Raja died in view of provisions of the Hindu Succession Act the plaintiff would never be entitled to any share in the property. In so far as Ramsi Raja is concerned he having expired prior to coming into existence of the Hindu Succession Act, i.e. 1954, this plea cannot be available to the appellant-defendents. In so far as Bhagwan Raja is concerned, though prima facie it may seem that the provision of Hindu Succession Act would come into play, the contention can be upheld, assuming it is available, only to the extent of the share of deceased Bhagwan Raja in the ancestral property that is to say, on the basis of a deemed partition only share which could be carved out relatable to deceased Bhagwan Raja would be heritable; and this heritance will firstly include the heirs of class-I and the plaintiff would again be entitled on this count also. Therefore, this contention must fail.

18. One more additional contention was raised before us that Ramsi Raja's widow executed in 1970 a registered gift deed by virtue of which she had gifted the properties belonging to Ramsi Raja to defendant nos. 1 and 2, namely, Babu and Mensi. In this connection, suffice it to state that this plea was never raised by the defendants either in the written statement or even in pleadings before the trial Court; not only that, even in the grounds of appeal the said aspect has not been urged before us. In view of this position, we are not entertaining this plea of the appellant which is based on additional evidence. The appellants have filed Civil Application No.3969 of 1999 seeking admission of additional evidence. The said application was heard by this Court (Coram : M.S. Parikh, J) on 8.8.2000 and rule was issued and it was stated in Order dated 8.8.2000 that the said application requires consideration along with the main matter. On behalf of respondents an affidavit-in-reply dated 29th June, 2000 is also on record. Having heard both the sides, we are not inclined to entertain the Civil Application for admission of additional evidence in light of the fact that - (1) The suit is filed in 1979, (2) The written statement was filed on 8th January, 1980 (3) The suit was decided on 12th Sept., 1990 (4) The appeal was filed on or about 13th October, 1993. (5) After the appeal was admitted and fixed for final hearing this Civil Application has been filed on or about 30th April, 1999.

19. In the Civil Application it is stated that the applicants are illiterate persons and were not properly guided. That the applicants having gone through the documentary material in detail and on checking up the revenue records, it was found that certain documentary material which was relevant had not been produced. It is further stated in the application that the said documentary evidence were not brought on record despite due diligence and that the entire documentary material was in a bunch of papers clubbed together.

20. We have given anxious consideration to the plea raised in the civil application and we find that there is nothing on the basis of which it can be established that the original defendants were not in a position to produce the documents on which reliance is now sought by way of additional evidence. There is no explanation even to show why this Civil Application for admission of additional evidence could not be filed before April 1999 when appeal had already been filed in 1993. This is not a case where the documents have come in possession of the applicants after the decision of the trial Court, but on their own say these documents were in the entire bunch of documentary evidence available with them and the only plea is that they are illiterate; that in spite of due diligence they could not bring them on record. This plea does not inspire confidence. Even assuming for the sake of argument, that what is stated by the applicants is true and correct, there is no explanation as to why the said aspect did not comeforth in the oral deposition recorded at the time of the trial. This is more so, when the revenue records in relation to lands wherein mutation of entry had taken place when the father allotted lands to Babu and Mensi, were brought on record as material evidence. Moreover, on behalf of respondents it was pointed out that widow of Ramsi Raja expired some 20 years back; she could not have executed any such gift deed in 1970; that the gift deed is produced only after her death and that too at such a late stage. There is no explanation comingforth in response to this submission. This civil application is therefore rejected and the plea for admission of additional evidence is not entertained. Rule in Civil Application No.3969 of 1999 is discharged.

21. In view of the fact that we have not entertained the application for admission of additional evidence, contention based on such evidence must also fail as they remain mere contentions without any supporting proof.

22. On behalf of the appellants a further plea was

raised that the original suit must fail for nonjoinder of necessary party. Elaborating on this, the learned counsel stated that Bhagwan Raja had one son named Kala through second wife; that the said son Kala predeceased Bhagwan Raja but Kala's widow, namely, Raji was alive and she was a member of joint family and in absence of her being joined as necessary party the original suit should fail. This aspect of the matter is based on facts and it was never stated in written statement or in any of the oral depositions or pleadings before the trial Court. Even otherwise, assuming Raji i.e. Kala's widow was entitled to any right in the joint family property as a member thereof it was open to her to pursue any remedy that may be available to her under the law. However, what is more fatal to the case of the appellants is the fact that the said Raji remarried Mensi i.e. defendant No.2 prior to 1964. That at this point of time as no share had been carved out Raji had not become entitiled to any share. Therefore, she ceased to be a member of Kala's branch and became a member of Mensi's branch and thus her interest would be taken care of as and when the partition would take place and Mensi would receive his share; because, on Kala's death his share had merged in the larger H.U.F. and would go to all the remaining co-parceners/members. The appellants had also raised a plea to the effect that the trial Court was in error in holding that as deceased Bhagwan Raja had already allotted some part of lands to the plaintiff, he was allotted his share of the joint family property and was not entitled to any further share out of the remaining properties. It was stated that it should be deemed that the father had effected a partition at that point of time, and once that is shown a plea for partition for the second time could not be entertained. On behalf of respondent, it was stated that there was no partition and the plaintiff had only been given some lands for earning his livelihood and even those lands had been taken back and the plaintiff had been driven out of those lands. These factual aspect was not disputed by the appellant-defendents but what was stated that the plaintiff ought to have then filed a suit for dispossession and not a suit for partition.

23. These contentions on behalf of the appellants must fail in view of the fact that the deceased father was originally defendant no. 1 and it was at his behest that the written statement had been filed and it was nowhere stated that a partition had been effected by him because if he had effected such partition as claimed by the appellants, he was the best person and he would not have missed to state so in the written statement.

24. Lastly, a feeble plea was sought to be raised questioning the right of the respondents claim to be legal heirs of the deceased original plaintiff. These contentions are required to be stated to be rejected. The reasoned order by this Hon'ble Court (Coram : N.J. Pandya, J) dtd.21.4.1995 in Civil Application No.4824 of 1994 by virtue of which the present respondents have been brought on record by the appellants themselves as legal heirs is a complete answer wherein this court has in no uncertain terms stated that :

" Civil Application No.4824 of 1994
in
First Appeal No.2390 of 1993

Coram : N.J.Pandya, J.
21-4-1985

ORAL ORDER :

In response to the Rule, L.A. Shri Parmar appeared for the other side and he has rightly pointed out that if the applicants want relief that they have prayed for they cannot at the same time continue to oppose the status of the respondents in their capacity as legal representative of the deceased original plaintiff in Execution Proceedings and other Civil Proceedings.

2. In the First Appeal No.2390 of 1993, Aher Ram was shown as respondent and the appellant came to know about his death and attempt was made to serve the notice. This also in a way is not the correct position as pointed out by L.A. Shri Parmar because by that time on 14th September 1993 the appellant came to know not only about the death of said original plaintiff, but about the request having been made by the present opponents to be joined as legal representative and at that time, their status as such was opposed before the trial Court. It is obvious that if the appellants want to continue the proceedings against the legal representative of the said deceased-plaintiff-respondent and when in that capacity they are joining the respondents today and at the same time requesting for setting aside the abatement, obviously, they will have to accept their status as legal representative in all the proceedings that are existing today in connection with the said litigation initiated by the said deceased-plaintiff respondent.

3. This Civil Application is, therefore, allowed with the aforesaid direction and clarification that the

status of the party sought to be brought in as legal representative of the deceased-plaintiff-respondent shall not be questioned by the appellants i.e. original defendants in any of the proceedings arising out of Special Civil Suit No.41 of 1989 of the Court of Civil Judge (S.D.), Veraval. Abatement is set aside. Necessary amendment to be carried out within one week from today. C.A. No. 4535 of 1993 in First Appeal No.2390 of 1993 to be listed for hearing on 28.4.1995. Rule is made absolute with no order as to costs."

25. In view of the aforesaid facts and circumstances of the case and the relevant material and evidence on record we find no infirmity in the order dtd.12th Sept., 1990 passed by the Civil Judge (S.D.), Veraval and there is no warrant to interfere with the same and we decline to do so. This appeal is, therefore, dismissed with no order as to costs. Record and proceedings be returned. As stated herein before Civil Application No.3969 of 1999 is also dismissed and Rule issued therein is discharged.

Sd/- Sd/-
(M.R.Calla, J) (D.A.Mehta,J)
(Katira)